(6)

Supreme Court, U.S.
FILE
OCT 15 1996
OFFICE OF THE CLERK

No. 95-1723

In the Supreme Court of the United States

OCTOBER TERM, 1996

TOM GRIMMETT, AS TRUSTEE FOR THE BANKRUPTCY ESTATE OF VINCENT SIRAGUSA and JOANNE SIRAGUSA,
Petitioners,

v.

PATRICIA L. BROWN, PATRICIA L. BROWN, LTD. and BECKLEY, SINGLETON, DELANOY, JEMISON & LIST,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR AMERICAN HONDA MOTOR COMPANY, INC. AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

ANDREW L. FREY
PHILIP ALLEN LACOVARA*
EVAN M. TAGER
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000

* *Counsel of Record*

23 pp

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 2

I. BASIC STATUTE-OF-LIMITATIONS PRINCIPLES COMPEL ADOPTION OF THE CLAYTON ACT ACCRUAL RULE, UNDER WHICH "KNOWLEDGE" AND "DISCOVERY" ARE IRRELEVANT. 3

A. Statutes Of Limitations Serve Important Public Policies. 3

B. The General Rule Is That The Limitations Period Begins To Run As Soon As All Elements Of A Claim Are In Existence, Without Regard To The Plaintiff's "Knowledge." 4

C. The Clayton Act Statute Of Limitations, Which This Court Has Borrowed For RICO, Is Subject To The General Accrual Rule, Without An Exception For "Discovery." 6

II. IF SOME "DISCOVERY" REQUIREMENT IS TO BE SUPERIMPOSED IN RICO CASES, IT SHOULD APPLY ONLY TO THE EXISTENCE OF THE INJURY 10

A. The Criticisms Of The "Injury Discovery" Rule And, By Implication, The Clayton Act Accrual Rule, Are Misguided. 10

B. Neither The "Injury And Pattern Discovery" Approach Nor The "Last Predicate Act" Approach Gives Adequate Weight To The Strong Federal Interest In Barring Stale Claims. 16

CONCLUSION 17

TABLE OF AUTHORITIES

Cases **Pages**

Adams v. *Wood*, 2 Cranch 336 (1805) 3

Agency Holding Corp. v. *Malley-Duff Assocs., Inc.*, 483 U.S. 143 (1987) 7, 12, 15

Akron Presform Mold Co. v. *McNeil Corp.*, 496 F.2d 230 (6th Cir. 1974) 7

Beneficial Standard Life Ins. Co. v. *Madariaga*, 851 F.2d 271 (9th Cir. 1988) 7

Chardon v. *Fumero Soto*, 462 U.S. 650 (1983) 16

Clark v. *Iowa City*, 87 U.S. (20 Wall.) 583 (1875) 4

Cullen v. *Margiotta*, 811 F.2d 698 (2d Cir. 1987) 5

Granite Falls Bank v. *Henrikson*, 924 F.2d 150 (8th Cir. 1991) 6

Guaranty Trust Co. v. *United States*, 304 U.S. 126 (1938) 3

H.J. Inc. v. *Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989) 15

Hennegan v. *Pacific Creative Serv., Inc.*, 787 F.2d 1299 (9th Cir. 1986) 7

Higgins v. *New York Stock Exchange, Inc.*, 942 F.2d 829 (2d Cir. 1991) 7

Holmes v. *Securities Investor Protection Corp.*, 503 U.S. 258 (1992) 12, 15

Information Exchange Sys., Inc. v. *First Bank Nat'l Ass'n*, 994 F.2d 478 (8th Cir. 1993) 6

TABLE OF AUTHORITIES — Continued

Pages

Keystone Ins. Co. v. *Houghton*, 863 F.2d 1125 (3d Cir. 1988) 10-11

Lampf, Pleva, Lipkind, Prupis & Petigrow v. *Gilbertson*, 501 U.S. 350 (1991) 7-8, 13

McCool v. *Strata Oil Co.*, 972 F.2d 1452 (7th Cir. 1992) 9, 12

Moline Plow Co. v. *Webb*, 141 U.S. 616 (1891) 4

Order of Railroad Telegraphers v. *Railway Express Agency, Inc.*, 321 U.S. 342 (1944) 3

Pauk v. *Board of Trustees of City Univ.*, 654 F.2d 856 (2d Cir. 1981) 5

Rawlings v. *Ray*, 312 U.S. 96 (1941) 4

Reves v. *Ernst & Young*, 507 U.S. 170 (1993) 15

Rodriguez v. *Banco Central*, 917 F.2d 664 (1st Cir. 1990) 16

Sedima, S.P.R.L. v. *Imrex Co.*, 473 U.S. 479 (1985) 12, 15

Texas v. *Allan Constr. Co.*, 851 F.2d 152[illegible] (5th Cir. 1988) 7

United States v. *Kubrick*, 444 U.S. 111 (1979) 3, 11, 14, 15

Urie v. *Thompson*, 337 U.S. 163 (1949) 6

Wilson v. *Garcia*, 471 U.S. 261 (1985) 3, 16

Wood v. *Carpenter*, 101 U.S. 135 (1879) 3

TABLE OF AUTHORITIES — Continued

Pages

Young v. *Clinchfield R.R.*, 288 F.2d 499 (4th Cir. 1961) 5-6

Zenith Radio Corp. v. *Hazeltine Research, Inc.*, 401 U.S. 321 (1971) 6, 9

Statutes

18 U.S.C. § 1961 12

18 U.S.C. § 1964(c) 12

42 Pa. Cons. Stat. Ann. § 5524 13

Ala. Code § 6-2-38(l) 13

Alaska Stat. § .09-10.070 13

Ariz. Rev. Stat. Ann. § 12-543 13

Ark. Code Ann. § 16-56-105 13

Cal. Civ. Proc. Code § 338 13

Colo. Rev. Stat. Ann. § 13-80-101(1)(c) 13

Conn. Gen. Stat. Ann. § 52-577 13

D.C. Code Ann. § 12-301(8) 13

Del. Code Ann. tit. 10, § 8106 13

Idaho Code § 5-218(4) 13

Kan. Stat. Ann. § 60-513 13

La. Civ. Code Ann. art. 3492 13

Mass. Gen. Laws Ann. ch. 260, § 2A 13

Md. Code Ann. Cts. & Jud. Proc. § 5-101 13

TABLE OF AUTHORITIES — Continued

Pages

Miss. Code Ann. § 15-1-49 13

Mont. Code Ann. § 27-2-203 13

N.C. Gen. Stat. § 1-52 13

N.H. Rev. Stat. Ann. § 508:4 13

Nev. Rev. Stat. § 11.190 13

Okla. Stat. Ann. tit. 12, § 95 13

Or. Rev. Stat. § 12.110 13

P.L. 104-67, § 107 (1995) 12

P.L. 104-153, § 3 (1996) 12

S.C. Code Ann. § 15-3-530(5) 13

Tenn. Code Ann. § 28-3-105 13

Tex. Civ. Prac. & Rem. Code Ann. § 16.003 13

Utah Code Ann. § 78-12-26 13

Va. Code Ann. § 8.01-248 13

W. Va. Code § 55-2-12 13

Wash. Rev. Code Ann. § 4.16.080 13

Miscellaneous

CALVIN W. CORMAN, LIMITATION OF ACTIONS (1991) 4, 5

54 C.J.S. *Limitations of Actions* (1987) 4, 5

BRIEF FOR AMERICAN HONDA MOTOR COMPANY, INC. AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICUS CURIAE

American Honda Motor Company, Inc. is the American distributor of Honda automobiles, motorcycles, all-terrain vehicles, and other motorized vehicles. As a major participant in the American economy, Honda, like so many other legitimate businesses, has found itself subject to lawsuits seeking treble damages under RICO. In particular, it is currently defending numerous lawsuits brought by Honda dealers arising out of the convictions of several of Honda's executives for defrauding *Honda* by misusing their positions to obtain bribes from dealers in exchange for, *inter alia,* preferential treatment with respect to the award of new Honda dealerships. As a result, issues relating to the statute of limitations for RICO, including the accrual question presented in this case, are of critical importance to Honda.

The plaintiffs in the cases against Honda have submitted an amicus brief arguing for the broadest possible accrual rule. Honda accordingly submits this brief to apprise the Court why such an approach is fundamentally misguided and why no accrual rule broader than the one adopted by the court below is either necessary or appropriate.[1] In this brief, we neither respond to the factual allegations of the plaintiff-dealers nor provide a point-by-point reply to their legal arguments. This, after all, is not a case between Honda and its dealers. Instead, we provide an overall framework for the consideration of the accrual issue and respond to the key criticisms levied by petitioners, their amici, and some of the lower courts against the Ninth Circuit's accrual rule and, by implication, the Clayton Act accrual rule, which we endorse as being the most consistent with both the Court's statute-of-limitations jurisprudence and its prior RICO decisions.

---

[1] The parties have consented to the filing of this brief. Letters evidencing their consent have been lodged with the Clerk of the Court.

SUMMARY OF THE ARGUMENT

Resolution of this case should be straightforward. The general rule is that a claim accrues and the statute of limitations begins to run when all elements of the claim are in existence. This is the rule for federal antitrust claims under the Clayton Act. Because this Court already has determined that the Clayton Act is the appropriate source from which to borrow the statute of limitations for RICO, it is eminently logical to borrow the Clayton Act's accrual rule as well.

Either the Clayton Act accrual rule or the Ninth Circuit's "injury discovery" rule, combined with traditional tolling principles, appropriately balances the important federal interest in cutting off stale claims against the equally valid interest in vindicating RICO's purposes. By contrast, the "injury and pattern discovery" rule endorsed by the petitioners and the "last predicate act" rule urged by their amici give inadequate weight to the concerns underlying statutes of limitation and would create an undesirable incentive for lawyers to use their existing cases as a means of digging up stale, but potentially lucrative, claims.

ARGUMENT

Petitioners' brief, the briefs of their two amici, and many of the lower court decisions on this issue suffer from the same shortcoming: they complicate and confuse the inquiry by starting in the middle instead of the beginning. We believe that, if the Court starts with first principles, it will find the answer to the accrual issue to be both simple and sensible. Accordingly, in Part I of this brief, we show how fundamental statute-of-limitations principles compel adoption of the Clayton Act accrual rule, which embodies no "discovery" requirement. We then turn in Part II to explaining why, if some "discovery" requirement is to be superimposed, that requirement should be limited to the existence of the injury and should not extend to the existence

of a "pattern of racketeering," as petitioners advocate, or to the existence of the "last predicate act" that is part of the pattern, as their amici urge.

I. BASIC STATUTE-OF-LIMITATIONS PRINCIPLES COMPEL ADOPTION OF THE CLAYTON ACT ACCRUAL RULE, UNDER WHICH "KNOWLEDGE" AND "DISCOVERY" ARE IRRELEVANT.

A. Statutes Of Limitations Serve Important Public Policies.

No discussion of accrual principles should begin without recognizing the salutary purposes served by statutes of limitations. As this Court emphasized a half century ago:

> "Statutes of limitation * * * are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them."

Order of Railroad Telegraphers v. *Railway Express Agency, Inc.*, 321 U.S. 342, 348-349 (1944). Indeed, from the earliest days of the Republic to the present, this Court has held to the view that "[a] federal cause of action 'brought at any distance of time' would be 'utterly repugnant to the genius of our laws.'" *Wilson* v. *Garcia*, 471 U.S. 261, 271 (1985) (quoting *Adams* v. *Wood*, 2 Cranch 336, 342 (1805)). See also *United States* v. *Kubrick*, 444 U.S. 111, 117 (1979) (noting that statutes of limitations "'are found and approved in all systems of enlightened jurisprudence,'" and should be regarded "as a 'meritorious defense, in itself serving a public interest'") (quoting *Wood* v. *Carpenter*, 101 U.S. 135, 139 (1879), and *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 136 (1938)).

B. The General Rule Is That The Limitations Period Begins To Run As Soon As All Elements Of A Claim Are In Existence, Without Regard To The Plaintiff's "Knowledge."

Many of the lower courts addressing the RICO accrual issue have debated about *which* elements of a RICO claim the would-be plaintiff must have "knowledge" of in order to trigger the statute of limitations. Although these decisions might lead an uninformed observer to conclude otherwise, it is well settled that, as a general rule, causes of action accrue and statutes of limitation begin to run when there is a "complete and present cause of action." *Rawlings* v. *Ray*, 312 U.S. 96, 98 (1941). See also *Moline Plow Co.* v. *Webb*, 141 U.S. 616, 623 (1891) (it is a "general rule that limitation begins to run from the time the plaintiff could sue"); *Clark* v. *Iowa City*, 87 U.S. (20 Wall.) 583, 589 (1875) ("[a]ll statutes of limitation begin to run when the right of action is complete"); 1 CALVIN W. CORMAN, LIMITATION OF ACTIONS § 6.1, at 370 (1991) ("Frequently, legislation stating that commencement [of the limitations period] occurs when the plaintiff's cause of action accrues is interpreted by courts to mean that moment when the plaintiff has a complete and present cause of action."); 54 C.J.S. *Limitations of Actions* § 81, at 116 (1987) ("Unless a statute provides otherwise, the statute of limitations begins to run at the time when a complete cause or right of action accrues or arises, which occurs as soon as the right to institute and maintain a suit arises.").

In other words, the general rule is, and long has been, that it is the *existence* of the elements of the cause of action, not the plaintiff's *knowledge* of all or some of those elements, that triggers the statute of limitations:

> "Generally, mere ignorance of the existence of a cause of action or of the identity of the wrongdoer does not prevent the running of the statute of limitations. Except where modified by statute, the rule is that the cause of action accrues when the act upon which the legal action is based took place and not when the damage became known. Difficulty in ascertaining the existence of a cause of action is irrelevant."

Id. § 87, at 123 (footnotes omitted). Accord 2 CALVIN W. CORMAN, *supra*, § 11.1.1, at 134 ("Generally, the cause of action accrues, and the statute of limitations begins to run, at the time of the occurrence of a judicially recognizable injury or event constituting a breach of duty. The statute commences at that time even though the plaintiff is unaware of the accrual of his or her cause of action.").

Against this backdrop, some courts have fashioned a "discovery" element as an exception to the general rule in selected types of cases. That "discovery" exception — which provides that the statute of limitations begins to run from the date the plaintiff discovered or reasonably should have discovered the injury (and, in some cases, the cause of the injury and/or the identity of the tortfeasor) — was developed in medical malpractice cases to address the problems of foreign objects left in patients' bodies during surgery and in occupational disease cases to address the problem of diseases with long latency periods. See 2 CALVIN W. CORMAN, *supra*, §§ 11.1.2.1, 11.1.2.3; 54 C.J.S. *Limitations of Actions* § 87, at 124. However, the "discovery rule" remains an *exception* to be invoked "circumspectly" as "an equitable adjustment in, not an abrogation of, statutes of limitations." *Ibid.*

Some cases have stated broadly that "[u]nder federal principles, a claim accrues when the plaintiff 'knows or has reason to know' of the injury that is the basis of the action." *Cullen* v. *Margiotta*, 811 F.2d 698, 725 (2d Cir. 1987) (quoting *Pauk* v. *Board of Trustees of City Univ.*, 654 F.2d 856, 859 (2d Cir. 1981)). These broad statements, however, trace back to cases applying the discovery rule in the narrow contexts of medical malpractice and occupational diseases. *E.g.*, *Young* v. *Clinchfield R.R.*, 288 F.2d 499, 503 (4th Cir.

1961) (*Urie* v. *Thompson*, 337 U.S. 163 (1949), "unquestionably demonstrates the Court's view that *when the nature of the injury is such that it does not manifest itself immediately*, the determination of when the cause of action accrued does not depend on when the injury was inflicted" but rather on "when the plaintiff has reason to know he has been injured") (emphasis added).

This Court has never held that the "discovery" exception should become the norm in all federal cases. Moreover, even if this were in fact the general federal rule, it manifestly is not the rule under the Clayton Act, which, as we argue below, provides the appropriate model here.

C. The Clayton Act Statute Of Limitations, Which This Court Has Borrowed For RICO, Is Subject To The General Accrual Rule, Without An Exception For "Discovery."

1. Significantly, the general accrual rule — *without* a "discovery rule" exception — applies to federal antitrust claims brought under the Clayton Act. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971) ("Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business."). Thus, except when the plaintiff proves "fraudulent concealment" of the operative facts, the statute of limitations for treble-damages claims under the antitrust laws begins to run as soon as the anticompetitive conduct causes injury, irrespective of the plaintiff's "knowledge" of any of the elements of the accrued claim.[2]

---

[2] See, *e.g.*, *Information Exchange Sys., Inc.* v. *First Bank Nat'l Ass'n*, 994 F.2d 478, 484 (8th Cir. 1993) (subject to an exception for fraudulent concealment, "[a] cause of action accrues under the antitrust laws when the defendant commits an act that injures the plaintiff's business"); *Granite Falls Bank* v. *Henrikson*, 924 F.2d 150, 153 (8th Cir. 1991) ("accrual in antitrust actions depends on the commission of the defendant's injurious act rather than on the plaintiff's knowledge of that act or the resulting injury"); *Higgins* v. *New York Stock Exchange, Inc.*, 942 F.2d 829, 832 (2d Cir. 1991) ("A cause of action for violation of the antitrust laws ordinarily accrues as soon as there is injury to competition."); *Texas* v. *Allan Constr. Co.*, 851 F.2d 1526, 1528 (5th Cir. 1988) (in action alleging conspiracy in restraint of trade, limitations period "begins with an overt act done pursuant to the conspiracy" unless plaintiff can "demonstrate that fraudulent concealment tolled the running of the limitations period"); *Beneficial Standard Life Ins. Co.* v. *Madariaga*, 851 F.2d 271, 274-275 (9th Cir. 1988) (in actions governed by the Clayton Act statute of limitations, "the plaintiff's knowledge is generally irrelevant to accrual, which is determined according to the date on which injury occurs"); *Hennegan* v. *Pacifico Creative Serv., Inc.*, 787 F.2d 1299, 1302 (9th Cir. 1986) ("Ignorance of an antitrust cause of action alone is insufficient to toll the statute of limitations."); *Akron Presform Mold Co.* v. *McNeil Corp.*, 496 F.2d 230, 233 (6th Cir. 1974) (absent fraudulent concealment or other conduct by the defendant that induces the plaintiff not to file suit, Clayton Act's statute of limitations "commences to run from the commission of the last overt act causing injury or damage").

That settled doctrine under the federal antitrust laws ought to be dispositive here. This Court already has held that, "[t]ogether with the similarities in purpose and structure between RICO and the Clayton Act, the clear legislative intent to pattern RICO's civil enforcement provision on the Clayton Act strongly counsels in favor of application of the 4-year statute of limitations used for Clayton Act claims." *Agency Holding Corp.* v. *Malley-Duff Assocs., Inc.*, 483 U.S. 143, 152 (1987). Particularly because the Clayton Act's accrual rule pre-dated enactment of RICO, it makes no sense to adopt the Clayton Act's four-year statute of limitations, which runs from accrual of the claim, without also adopting the Clayton Act's accrual rule.

Indeed, in performing the analogous task of determining the appropriate statute of limitations for the implied right of action under SEC Rule 10b-5, this Court rejected the idea of borrowing one component of the 1934 Act's explicit one-year/three-year statute of limitations, while substituting for the other component a case-by-case laches defense. *Lampf,*

Pleva, Lipkind, Prupis & Petigrow v. *Gilbertson,* 501 U.S. 350, 362 n.8 (1991). The Court commented that "such a practice comes close to the type of judicial policymaking that our borrowing doctrine was intended to avoid." *Ibid.*

As with the two-pronged statute of limitations borrowed in *Lampf,* the Clayton Act's accrual rule — which, after all, is simply the general accrual rule — is "indivisible" from the Clayton Act's statute of limitations. Here, as in *Lampf,* cobbling together the Clayton Act's statute of limitations with some alien accrual rule would constitute "the type of judicial policymaking that [this Court's] borrowing doctrine was intended to avoid."

2. The Clayton Act statute of limitations and its accompanying accrual rule have existed, and worked well, for decades. Had the combination of a four-year limitations period with the general accrual rule worked a substantial hardship on antitrust plaintiffs or undermined the deterrent effect of the civil antitrust remedy, Congress surely would have changed one or the other.

In fact, the Clayton Act limitations period and accrual rule are manifestly reasonable. To begin with, contrary to the assertions of petitioners and their amici, four years is not an unreasonably short time to "discover" the basis for bringing a lawsuit. Four years is the duration of an entire college education. It takes less than four years to build a skyscraper. Four years is the period that the Constitution fixes for the President to accomplish the objectives of that office. In four years, claimants will bring tens of thousands of civil suits in federal courts, including huge numbers of RICO claims. And, during a four-year period, this Court will decide 300 to 400 cases on the merits and fill 16 volumes of the U.S. Reports. Particularly given the unprecedented, and ever-increasing, availability of information, now is hardly the time to conclude that a four-year limitations period is so harsh as to necessitate abandonment of the general accrual rule in favor of some broad-based discovery rule.

Moreover, the Clayton Act's accrual rule, like the general accrual rule, is subject to tolling if the defendant engaged in some course of action designed to deceive a potential plaintiff into ignoring his accrued claim, even though he or she has already suffered actionable injury. See note 2, *supra*. These tolling principles ameliorate unfairness and help distinguish cases in which the potential defendant actively prevents an injured victim from discovering the violation from those in which the plaintiff simply has not been diligent in investigating the cause of his or her injury. These principles would perform the same function in RICO cases governed by the Clayton Act accrual rule.

Finally, it bears mention that, even if a plaintiff does not discover an on-going antitrust conspiracy within four years of the first injury, the plaintiff is not completely out of court. Rather, "each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act." *Zenith,* 401 U.S. at 338. "[A]s to those damages, the statute of limitations runs from the commission of the act." *Ibid.* Thus, while tardy plaintiffs might find that they are time barred from recovering some of their damages, such plaintiffs can still recover treble damages for later incurred injuries.

This corollary to the Clayton Act accrual rule would serve a similar ameliorative function in RICO cases. See, *e.g., McCool* v. *Strata Oil Co.,* 972 F.2d 1452, 1465 (7th Cir. 1992) ("[a]s in a civil antitrust case, a new cause of action under RICO arises on the occurrence of each separate injury"). Indeed, plaintiffs would continue to have causes of action under state and perhaps other federal law for the offenses (including fraud) that constitute the specific predicate acts. Those claims would be subject to their own statutes of limitations and accrual rules. Thus, the chances are even greater in the RICO context that even the dilatory plaintiff can pursue full compensation (or, if punitive damages are

available, more than full compensation), even if the plaintiff has not timely asserted a RICO claim.

In sum, the Court should hold that RICO claims, like federal antitrust claims, accrue as soon as all of the elements of the claim exist and that the plaintiff's "knowledge" is not a necessary ingredient in the accrual of the claim. Once all of the elements of a RICO claim exist — including injury and a "pattern of racketeering" — the four-year statute of limitations begins to run.

II. IF SOME "DISCOVERY" REQUIREMENT IS TO BE SUPERIMPOSED IN RICO CASES, IT SHOULD APPLY ONLY TO THE EXISTENCE OF THE INJURY.

Assuming that, contrary to the foregoing arguments, the Court concludes that some discovery rule is warranted in this context, we submit that the "injury discovery" rule adopted by the court below is the appropriate one. That rule, which appears to be the majority rule in the courts of appeals (see Pet. App. 7a-8a), appropriately balances the salutary purposes of statutes of limitations with whatever concern there may be about the statute running before the plaintiff realizes that he or she has been injured. (As in antitrust cases, and unlike in some medical malpractice and occupational disease cases, it is highly unlikely that a person injured as a result of a RICO pattern will not notice the injury soon after it occurs.)

A. The Criticisms Of The "Injury Discovery" Rule And, By Implication, The Clayton Act Accrual Rule, Are Misguided.

Petitioners, their amici, and some of the courts of appeals level four principal criticisms against the Ninth Circuit's "injury discovery" rule and, by implication, the Clayton Act accrual rule. First, they state that the "injury discovery" rule could result in the statute of limitations running before a cause of action exists. See Pet. Br. 13, 41-44; Exec. Comm. Am. Br. 5; NASCAT Am. Br. 5-8 & n.8; *Keystone Ins. Co.*

v. *Houghton*, 863 F.2d 1125, 1130 (3d Cir. 1988). Second, they argue that neither of those rules is appropriate for RICO causes of action predicated upon allegations of fraud. Pet. Br. 29-32. Third, they contend that the "injury discovery" rule and, by implication, the Clayton Act accrual rule cannot be squared with the accrual rule adopted in *United States* v. *Kubrick*, 444 U.S. 111 (1979). Pet. Br. 34-36. And fourth, they contend broadly that these accrual rules do not comport with Congress's mandate that RICO be given a "liberal construction" to effectuate its remedial purposes. Pet. Br. 33; Exec. Comm. Am. Br. 9, 12; NASCAT Am. Br. 22 n.25. These arguments all miss the mark.

1. The contention that the "injury discovery" rule could result in the statute of limitations running before a RICO cause of action exists is the prototypical strawman. It derives from a fundamental misunderstanding of that rule. (Needless to say, no one ever has leveled this criticism against the Clayton Act accrual rule, which, by definition, requires all elements of an antitrust cause of action to be extant before the statute of limitations is triggered.) Under the "injury discovery" rule, the statute of limitations does not begin to run until *both* (1) all elements of the cause of action are present *and* (2) the plaintiff knows or reasonably should know that he or she has been injured. As the court below explained it:

> "Because a RICO cause of action cannot accrue until all the elements exist, no statute of limitations can begin to tick until a pattern exists, which will not be until continuity exists and the one year usually required to establish continuity has already lapsed. Both accrual rules at issue here [*i.e.*, the "injury discovery" rule and the "injury and pattern discovery" rule] require all the elements to exist; neither will begin to tick until the one-year continuity delay has lapsed. Because this one-year delay impacts both rules equally, it favors neither."

Pet. App. 12a (citation omitted). Accord *McCool*, 972 F.2d at 1465 ("There must, of course, be a pattern of racketeering before the plaintiff's RICO claim accrues, and this requirement might delay accrual until after the plaintiff discovers her injury," if the plaintiff is injured by a predicate act before a "pattern of racketeering" has evolved.).

2. The suggestion that the accrual rule for fraud actions — *i.e.*, that the statute of limitations is triggered when the plaintiff discovers or should have discovered the fraud — should apply to RICO actions is equally misguided. Although some kinds of fraud are listed among the multiple criminal violations that might qualify as predicate acts, RICO most assuredly is not a federal fraud statute. It is the special confluence of otherwise criminal acts that involve an "enterprise" and form a "pattern" that converts a state common law action into a federal treble damages claim. *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 497 (1985). It thus is quite beside the point that alleged fraud has been a frequent basis for bringing a RICO claim.[3] The bottom line is that this Court has concluded that the most appropriate analogy for RICO's civil remedy is to antitrust, not common law fraud. *Agency Holding*, 483 U.S. at 149, 151-152. See also *Holmes* v. *Securities Investor Protection Corp.*, 503 U.S. 258, 267 (1992) ("[w]e have repeatedly observed that Congress modeled § 1964(c) [of RICO] on the civil action provision of the federal antitrust laws, § 4 of the Clayton Act"); *Sedima*, 473 U.S. at 489 ("[t]he clearest current in [RICO's legislative] history is the reliance on the Clayton Act model").

---

[3] We note that fraud should become a less frequent basis for civil RICO suits (both absolutely and proportionately) now that Congress has eliminated securities fraud as a predicate act (see 18 U.S.C. § 1964(c) (as amended by P.L. 104-67, § 107 (1995)), while adding video and software piracy, criminal copyright infringement, and trafficking in counterfeit goods (see 18 U.S.C. § 1961 (as amended by P.L. 104-153, § 3 (1996)).

Thus, applying the special fraud accrual rule to the ample four-year antitrust statute of limitation for all RICO claims would be both illogical (because not all RICO claims are based on fraud) and unfair.[4] It also is unnecessary. Even if the Clayton Act accrual rule might result in a *RICO* suit being time barred, state accrual principles would apply to any direct claims based on the predicate acts that constitute fraud. For example, if the RICO claim is based on mail fraud, the plaintiff would remain entitled to bring a common law fraud claim (no doubt seeking punitive damages far in excess of twice the compensatories) subject to whatever state accrual rules apply to such a claim. Thus, no great injustice and no underdeterrence of fraud will result from applying either the Clayton Act accrual rule or the "injury discovery" rule to RICO claims, even those involving "fraud" predicates.

---

[4] Indeed, a majority of the States have adopted statutes of limitations for fraud that are less than four years. See Ala. Code § 6-2-38(l) (two years); Alaska Stat. § .09-10.070 (two years); Ariz. Rev. Stat. Ann. § 12-543 (three years); Ark. Code Ann. § 16-56-105 (three years); Cal. Civ. Proc. Code § 338 (three years); Colo. Rev. Stat. Ann. § 13-80-101(1)(c) (three years); Conn. Gen. Stat. Ann. § 52-577 (three years); Del. Code Ann. tit. 10, § 8106 (three years); D.C. Code Ann. § 12-301(8) (three years); Idaho Code § 5-218(4) (three years); Kan. Stat. Ann. § 60-513 (two years); La. Civ. Code Ann. art. 3492 (one year); Md. Code Ann. Cts. & Jud. Proc. § 5-101 (three years); Mass. Gen. Laws Ann. ch. 260, § 2A (three years); Miss. Code Ann. § 15-1-49 (three years); Mont. Code Ann. § 27-2-203 (two years); Nev. Rev. Stat. § 11.190 (three years); N.H. Rev. Stat. Ann. § 508:4 (three years); N.C. Gen. Stat. § 1-52 (three years); Okla. Stat. Ann. tit. 12, § 95 (two years); Or. Rev. Stat. § 12.110 (two years); 42 Pa. Cons. Stat. Ann. § 5524 (two years); S.C. Code Ann. § 15-3-530(5) (three years); Tenn. Code Ann. § 28-3-105 (three years); Tex. Civ. Prac. & Rem. Code Ann. § 16.003 (two years); Utah Code Ann. § 78-12-26 (three years); Va. Code Ann. § 8.01-248 (two years); Wash. Rev. Code Ann. § 4.16.080 (three years); W. Va. Code § 55-2-12 (two years). Moreover, the statute of limitations for securities fraud is the shorter of three years from the fraud and one year from the discovery of the fraud (*Lampf*, 501 U.S. at 364) — far shorter than the four years from discovery approach urged by petitioners and their amici.

3. Petitioners' reliance upon *Kubrick* is unwarranted because the Court in that case did not adopt any kind of discovery requirement, even for a limited class of federal claims. *Kubrick* involved a medical malpractice claim under the Federal Tort Claims Act ("FTCA"). The Court was confronted with the question whether the FTCA's two-year statute of limitations barred the claim of a plaintiff who discovered his injury and the cause of that injury more than two years before he filed suit or whether instead the suit was timely because it was filed less than two years after the plaintiff learned that the injury was the result of medical malpractice. The Court did not affirmatively decide whether to adopt the "injury and cause" discovery rule for medical malpractice cases and/or FTCA cases generally (because the plaintiff would have been untimely whether or not that was the rule).[5] Nevertheless, it roundly rejected the plaintiff's contention that the two-year statute of limitations under the Federal Tort Claims Act should not begin to run until after discovery that the medical treatment that caused the injury constituted malpractice.

Even if *Kubrick* could be understood to have left room to create an "injury and cause discovery" rule in medical malpractice cases under the FTCA, it would hardly support petitioners' proposed "injury and *pattern* discovery" rule. Quite simply, the cause of injury under RICO is the predicate acts, not the pattern. *Sedima*, 473 U.S. at 497 ("Any recoverable damages occurring by reason of a violation of §

---

[5] See 444 U.S. at 120 ("[T]he Court of Appeals recognized that the general rule under the Act has been that a tort claim accrues at the time of the plaintiff's injury, although it thought that *in medical malpractice cases* the rule had come to be that the 2-year period did not begin to run until the plaintiff has discovered both his injury and its cause. But even so — and the United States was prepared to concede as much *for present purposes* — the latter rule would not save Kubrick's action since he was aware of these essential facts [more than two years before he filed suit].") (emphasis added).

1962(c) [of RICO] will flow from the commission of the predicate acts."). Just as the Court refused to allow FTCA suits to be delayed until discovery that the injury resulted from a breach of the duty of care, there is no basis here for allowing delay of RICO suits until discovery that the act causing the plaintiff's injury was part of a pattern that may have injured unrelated persons as well.

4. Finally, the by-now tired refrain that RICO is to be "liberally construed" is not an open invitation to accept whatever argument a RICO plaintiff is currently proffering. Indeed, that bromide did not prevent the Court from interpreting RICO to embody a rigorous proximate cause requirement. See *Holmes*, 503 U.S. at 265-274. It did not prevent the Court from holding that the defendant must have participated in the management or operation of the enterprise to be subject to RICO liability. See *Reves* v. *Ernst & Young*, 507 U.S. 170, 183-184 (1993). And it did not prevent the Court from rejecting broad interpretations of the "pattern" requirement. See *H.J. Inc.* v. *Northwestern Bell Tel. Co.*, 492 U.S. 229, 236, 243 n.4 (1989) (rejecting notions that "a pattern is established merely by proving two predicate acts" and that RICO applies to short periods of criminal activity that are unlikely to recur in the future).

The Court already has concluded that borrowing the Clayton Act's statute of limitations does not violate the "liberal construction" mandate. See *Agency Holding*, 483 U.S. at 155-156 (rejecting use of the longer statute of limitations for criminal RICO violations). There is no reason whatever to conclude that use of its accompanying accrual rule is any more violative of that mandate.

B. Neither The "Injury And Pattern Discovery" Approach Nor The "Last Predicate Act" Approach Gives Adequate Weight To The Strong Federal Interest In Barring Stale Claims.

Unlike the Clayton Act and "injury discovery" rules, the "injury and pattern discovery" rule endorsed by petitioners does not fairly balance the competing interests. That kind of rule threatens to postpone indefinitely the running of the statute of limitations because the concept of a "pattern" is a nebulous one, knowledge of which courts are sure to be hesitant about imputing. Indeed, precisely because of the vagaries involved in determining whether or not a pattern exists, an "injury and pattern discovery" rule will undermine "the federal interest * * * in having 'firmly defined, easily applied rules'" governing statutes of limitations. *Wilson*, 471 U.S. at 270 (quoting *Chardon* v. *Fumero Soto*, 462 U.S. 650, 667 (1983) (Rehnquist, J., dissenting).

The "last predicate act" rule adopted by the Third Circuit and endorsed by both of petitioners' amici, is even more unbalanced than the "injury and pattern discovery" rule. This proposed rule lacks support in any other branch of civil jurisprudence. Nowhere else does a potential defendant's commission of a wrongful act directed at a third person revive the long-lapsed claim of an unrelated plaintiff.

The "last predicate act" approach is nothing but an invitation to gamesmanship. It would allow plaintiffs to wait until four years after the last act that is part of the supposed "pattern" even if their injuries ceased ten or twenty years earlier. And it also would enable lawyers who represent one client injured by a RICO predicate act to reach back to the very beginning of the alleged "pattern" in search of clients to bring new suits for old injuries. Nothing could be more inimical to the important federal principle of cutting off stale claims. See *Rodriguez* v. *Banco Central*, 917 F.2d 664, 666-667 (1st Cir. 1990) (Breyer, J.)

CONCLUSION

If the Court reaches the second issue presented by petitioners, it should adopt the Clayton Act accrual rule or, at most, the "injury discovery" rule.

Respectfully submitted.

ANDREW L. FREY
PHILIP ALLEN LACOVARA*
EVAN M. TAGER
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0602

* *Counsel of Record*

OCTOBER 1996